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No. 08-1464

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN MCCONNELL, JOHAN MCCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION INC., and the SOUTH YAPHANK CIVIC ASSOCIATION, *et al.*,

Petitioners,

v.

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION FOR RESPONDENT LONG ISLAND POWER AUTHORITY

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QUESTIONS PRESENTED

1. Whether property owners who unsuccessfully asserted state zoning and environmental claims in state court may assert substantive due process claims under the due process clause of the Fourteenth Amendment to the United States Constitution for the first time in this Court, when they have failed to raise, argue or preserve any federal or U.S. Constitutional issues in the state courts and the state courts have not considered such issues at any point in this litigation.

2. Whether property owners located more than one-half mile from a project site are deprived of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution when a town board and planning board, after public hearings and comprehensive zoning and environmental reviews, approve an industrial project in the town's industrial zone.

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The certiorari petition should be denied. Petitioners did not raise any federal statutory or constitutional claims in the proceedings below. Petitioners also fail to set forth a cognizable federal substantive due process claim in the certiorari petition. Instead, Petitioners rely on misleading and improper representations about an agreement that consists principally of payments in lieu of property taxes over a twenty-two year term for an approximately 100-acre parcel improved with a new industrial use that was approved, after extensive public review, in accordance with state land use and environmental laws. Petitioners' numerous state-law challenges to that use having failed, they now improperly seek this Court's review of claims never asserted in any of these challenges.

STATEMENT

A. The Caithness Project

This case involves an effort by property owners, led by a developer of luxury apartments, opposing a much-needed natural gas fired electrical generating facility with state-of-the-art environmental controls (the "Caithness Project") through meritless and at times frivolous litigation.

The Long Island Power Authority ("LIPA"), a public authority created by New York statute to provide an adequate, reliable, efficient supply of electricity to its ratepayers in an economic manner, has contracted to purchase power from the Caithness Project. *See* N.Y. PUB. AUTH. LAW 1020-a, 1020-g. This public project is needed to supply increasing demand for electricity on

Long Island, including demand from the 795-unit luxury apartment complex developed by Petitioner East End Property Co. #1, LLC. (JR. 6271-73)[1]

As required by the New York State Environmental Quality Review Act, LIPA prepared a comprehensive Environmental Impact Statement ("EIS") for the Caithness Project. (JR. 388-1047) That EIS concluded that the Project would result in no significant adverse impacts to the environment. (*Id.*) LIPA coordinated this environmental review with other state and local agencies, including the New York State Department of Environmental Conservation, New York Public Service Commission, Suffolk County Department of Health Services, and the Town of Brookhaven Town Board ("Town Board") and Planning Board ("Planning Board"), which made similar but independent environmental findings and issued permits for the Project. (*See, e.g.*, JR. 3958, 4036, 6275.)

Petitioners challenged LIPA's environmental review and power purchase agreement in a previous proceeding in the New York Supreme Court, Nassau County, in which the court dismissed Petitioners' claims in their entirety. *See E. End Prop. Co. #1, LLC v. Kessel*, No. 1410/2006, 2006 WL 6200914 (N.Y. Sup. Ct. Nassau Co. Mar. 27, 2006), *aff'd*, 46 A.D.3d 817, 851 N.Y.S.2d 565 (App. Div. 2d Dep't 2007) (awarding costs to Respondents), *leave to appeal denied*, 892 N.E.2d 394, 10 N.Y.3d 926 (2008) (same). Petitioner East End Property's challenge to the Public Service Commission's

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1. Joint Record on Appeal in Appellate Division Case No. 2007-05041 ("JR.__").

approvals and environmental findings in yet another proceeding, in the Supreme Court, Albany County, was also dismissed in its entirety.[2] As discussed below, Petitioners also brought three separate challenges in the Supreme Court, Suffolk County, which are now the subject of their certiorari petition. Notwithstanding Petitioners' characterization of this project as "noxious," the Caithness Project, which is now fully constructed and will commence commercial operation in July 2009, will be one of the cleanest power plants on Long Island. (JR. 6270)

B. State Law Authorizing the Community Benefits Package

Petitioners' strident characterization of the Project's Community Benefits Package ("CBP") as "illegal" and "corrupt" throughout the certiorari petition is misleading and improper. *See*, *e.g.*, Pet. at 5, 15, 17.

As the courts below acknowledged in their decisions, the CBP consists principally of an agreement to pay Payments In Lieu Of Taxes ("PILOTs"). *See* Petition Appx. at 35a, 80a; *see also* Petition at. 8, 12. PILOTs are explicitly authorized by New York state law. *See* N.Y. GEN. MUN. LAW § 858(15). Under New York law, owners of real property must pay real property tax unless they qualify for an exemption from that tax. *See* N.Y. REAL PROP. TAX LAW § 300. New York law also authorizes municipal industrial development agencies to facilitate economic development by entering into sale and

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2. *East End Prop. Co. #1, LLC v. Acampora*, Index No. 2180-07 (N.Y. Sup. Ct. Albany Co. Oct 4, 2007) (an unreported decision).

leaseback arrangements for real property. *See* N.Y. GEN. MUN. LAW §§ 852, 858(4). The resulting projects are exempt from real property taxes but are instead required to negotiate agreements to pay PILOTs. *See* N.Y. GEN. MUN. LAW § 874. Such agreements specify the amount due annually (or a formula for calculating that amount over a term of years) and thereby encourage economic development by providing certainty to the taxpayer and taxing jurisdiction. *See id.*

The final CBP between Caithness and the Town of Brookhaven Industrial Development Agency (the "IDA") for the Caithness Project requires $184 million in PILOTs over approximately 22 years. (*See*, eg., JR. 78, 6282)[3] That amount, an average of $8.4 million per year, is a reasonable property tax equivalent for a 15-acre portion of an approximately 100-acre parcel improved with a major industrial project. The PILOTs will be made to the Town IDA and allocated among affected tax jurisdictions (in proportion to the amount of taxes those jurisdictions would have otherwise received) and is not distributed to favored projects of Town Board members as Petitioners allege. *See* Pet. at 3. Nor is the CBP the act of a renegade local board doling out funds to favored constituencies.

The final CBP also encompasses an agreement between LIPA and the Town that provides for $12 million to the Town of Brookhaven and nearby school

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3. The final agreement as approved by the IDA is not contained in the Record below because it was executed after the Supreme Court Suffolk County proceeding commenced, which involved Petitioners' challenge to the draft terms of the agreement.

districts for community programs and energy efficiency projects. (JR. 78) This $12 million reflected an increase of $1 million for one school district when compared to the $11 million 2006 draft proposal that was the subject of Petitioners' lawsuit in the New York Supreme Court, Nassau County proceeding. *See supra* p. 2. LIPA's contractual arrangement with a municipality for this $12 million portion of the CBP is authorized by New York statute as a contract relating to the construction of a generating facility. N.Y. PUB. AUTH. LAW 1020-f(h),1020-g(k). The CBP is thus authorized by state law and was approved by both the New York Attorney General as to form and New York State Comptroller pursuant to the New York State Finance Law. (JR. 6284)[4] Therefore, Petitioners' repeated assertion that the CBP is not authorized by law is inaccurate. *See, e.g.*, Pet. at 4, 5, 11. Petitioners chose not to challenge directly the final agreements approved by the IDA and New York State Comptroller for the two components of the CBP, and the four-month statute of limitations for any such challenge has long since expired.

C. Proceedings Below

The Caithness Project is located in an area zoned for industrial use and in which the local zoning code expressly permits electrical generation facilities upon the issuance of a special use permit by the Town Board. *See* BROOKHAVEN TOWN CODE § 85-309. After a thorough review of the Caithness Project, including over 10 hours

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4. *See, e.g., footnote 3 supra.* The final agreement approved by the State Comptroller was executed well after Petitioners commenced the actions below and is not included in the Record.

of public testimony at several Town Board meetings, the Town Board concluded that the Caithness Project would not result in any significant environmental impacts and found that the applications for a special use permit and height variances or waivers fully complied with state requirements under the New York Town Law and local requirements under the Town of Brookhaven's Town Code. (JR. 3402, 4011-29)

Petitioners subsequently challenged the environmental and land use approvals for the Caithness Project in three separate proceedings filed in the Supreme Court, Suffolk County. On May 22, 2007, the court held that Petitioners lacked standing to challenge a site plan approval by the Planning Board. *See* Pet. Appx. 17a–23a. In its second decision, decided the same day as the first, the Supreme Court held, among other things, that (1) the relitigation of Petitioners' substantive challenges to the sufficiency of the EIS for the Caithness Project in the guise of a challenge to the merits of the Town Board's decision was barred by the doctrine of res judicata; (2) the Town Board's decision to table its vote on environmental findings and to subsequently vote to approve such findings required an explanation on the record; and (3) Petitioners did not have standing to challenge the land use approvals and variances granted by the Town Board. *See* Pet. Appx. 24a–71a. In accordance with the Supreme Court's order, on remand the Town Board included an explanation on the record, re-approved the environmental findings and re-issued its land use approvals. (RR. 538-71)[5]

5. Record on Appeal in Appellate Division Case No. 2008-00757 ("RR.__").

Petitioners again challenged those environmental findings and land use approvals. In its third decision in this case, the Supreme Court dismissed Petitioners' challenge in its entirety. *See* Pet. Appx. 72a–93a.

The parties appealed all three decisions of the Supreme Court, Suffolk County. The Appellate Division, Second Department, affirmed the Supreme Court's finding that Petitioners lacked standing for their challenge to land use approvals and permits because Petitioners live too far away from the Caithness Project site and otherwise provided no affidavits demonstrating any harm different from the public at large. The Appellate Division also reversed the Supreme Court's decision invalidating the Town Board's first approval of environmental findings because it found those findings to be adequately supported by the record and therefore dismissed the challenge to the Town Board's revised environmental findings as academic. *See* Pet. Appx. 8a-10a; 12a-13a; 16a. The Court of Appeals denied Petitioners leave to appeal. *See* Pet. Appx. 2a.

REASONS FOR DENYING THE PETITION

The certiorari petition mischaracterizes the facts and law in two significant ways. First, Petitioners did not raise or preserve any federal issue in this litigation. Second, Petitioners fail to identify any protected property interest that would support a substantive due process claim. Accordingly, this case does not warrant review.

I. Petitioners Did Not Raise or Preserve Any Federal Constitutional Claim and No Federal Constitutional Issue Was Decided By Any Court Below

It is well settled that when reviewing state court judgments under 28 U.S.C. § 1257, this Court will, "with very rare exceptions," refuse to consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision the petitioner asks this Court to review. *Yee v. City of Escondido*, 503 U.S. 519, 533, 112 S. Ct. 1522, 1531 (1992); *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029 (1997) (per curiam). This rule serves two purposes. First, it reflects comity between the federal and state courts, and requires that "state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements." *Webb v. Webb*, 451 U.S. 493, 499, 101 S. Ct. 1889, 1893 (1981). The rule also ensures that the record is adequately developed to enable this Court to address the issues presented. *Webb*, 451 U.S. at 500, 101 S. Ct. at 1893-94.

Petitioners did not raise a federal substantive due process claim, or even mention the Fourteenth Amendment to the United States Constitution, in their three petitions, numerous memoranda of law, three separately-briefed intermediate appeals, or brief seeking leave to appeal to the Court of Appeals of New York. Nor did the New York State courts mention, must less decide, any federal constitutional issue sua sponte. Each of the New York State courts' decisions were made exclusively on the basis of New York State law.

Where, as here, a state's highest court is silent on a federal question before the Court, it is assumed that the issue was not properly presented below, and petitioners fail to meet their burden of showing otherwise. *See Adams*, 520 U.S. at 86-87, 117 S. Ct. at 1029; *see aiso Webb*, 451 U.S. at 495, 101 S. Ct. at 1891 ("This Court has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts . . . .'") (citations omitted). Petitioners did not raise a federal question in the trial court, nor, as Petitioners' Rule 14(g)(1) statement confirms, did they cite any court's failure to address federal substantive due process in any questions on appeal. Thus, neither the Court of Appeals' decision to deny leave to appeal nor any of the Appellate Division's three decisions mention any federal issue. As in *Yee*, "[P]etitioners did not raise their substantive due process claim below, and because the state courts did not address it," it should not be considered here. 503 U.S. at 533, 112 S. Ct. at 1531.

Petitioners' passing reference to "due process" in their initial memorandum of law before the Suffolk County Supreme Court refers, at most, to a state law procedural due process claim under New York's Open Meetings Law and does not provide notice of a federal claim or either a procedural or substantive due process claim under the Fourteenth Amendment. To the extent that Petitioners also object to the fact that a Town Board that sits as a zoning board of appeals for land use determinations also, in its legislative capacity, evaluates the economic benefits of projects, *see* Pet. at 3, Petitioners' vague reference to "due process" in that context is simply inadequate to establish that the questions presented for review here were raised below. Similar to *Webb*, Petitioners' failure to cite to the United States Constitution or to any cases applying the substantive due process clause of the Fourteenth Amendment led the state courts to understand Petitioners to be referring to a question of state law. *See Webb*, 451 U.S. at 496-98, 101 S. Ct. at 1891-93; *see also Adams*, 520 U.S. at 89, n.3, 117 S. Ct. at 1031, n.3 (concluding that "passing invocations of 'due process'" that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet our minimal requirement that it must be clear that a *federal* claim was presented") (emphasis in original).

In *Adams*, a generalized discussion of "due process" in a context different than that asserted in the petition was insufficient to demonstrate that the "state court had 'a fair opportunity to address the federal question that [was] sought to be presented'" to the Court. 520 U.S. at 87, 117 S. Ct. at 1029. Moreover, even a reference to "due process" referencing the United States

Constitution would be insufficient to show that the issue raised here was decided below. It is well settled that "the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb*, 451 U.S. at 496-97, 101 S. Ct. at 1892.

Petitioners' passing reference to due process referred to the question of whether state Open Meetings Law procedures were violated, not to the constitutionality of the Community Benefits Package under the substantive due process clause of the Fourteenth Amendment. In fact, the Supreme Court, Suffolk County, exhaustively recited each of Petitioners' claims in its three decisions and at no point mentioned any federal constitutional issue, and, as a matter of state law, held that the Town Board complied with the Open Meetings Law. Pet. Appx. at 50-51a, 64-65a. As the Court has explained, "it would be unseemly in our dual system of government" to disturb the finality of a state court judgment on a federal ground that the state court did not have occasion to consider. *Webb*, 451 U.S. at 500, 101 S. Ct. at 1893-94.

Although Petitioners believe that the facts of this case raise important and recurring concerns, *see* Pet. at 5, this case has not involved an important and recurring issue of *federal law*. Essentially, Petitioners seek to challenge the holding that the zone of interest is different for state law land use claims than for state law environmental claims, which is purely an issue of state law. Petitioners also seek to challenge an

agreement that principally consists of PILOTs. Under New York law, a property owner does not have standing to challenge another property owner's property tax assessment or PILOTs. *See Colella v. Bd. of Assessors of Nassau*, 741 N.E.2d 113, 95 N.Y.2d 401 (2000); *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 559 N.E.2d 641, 76 N.Y.2d 428 (1990); *see also Fetzer v. Town Bd. of Aurora*, 289 A.D.2d 996, 734 N.Y.S.2d 915 (App. Div. 4th Dep't 2001) (following *Colella*).

As in *Adams*, "Petitioners have done nothing to demonstrate that they complied with the applicable state rules for raising their federal due process claim . . . ." 520 U.S. at 87, 117 S. Ct. at 1030. New York law generally provides that a claim is preserved only if it is asserted at trial. *See, e.g., People v. Liner*, 872 N.E.2d 868, 9 N.Y.3d 856 (2007) (finding confrontation clause challenge to admission of evidence unpreserved); *People v. Angelo*, 666 N.E.2d 1333, 1334, 88 N.Y.2d 217, 222 (1996) (due process challenge to expert testimony unpreserved "[b]ecause defendant failed to present these constitutional claims to County Court"). Petitioners seek review of a state court decision that was decided exclusively on state law grounds. That underlying proceeding, brought under Article 78 of New York's Civil Practice Law and Rules ("CPLR"), was decided on the basis of a voluminous administrative record, briefs and oral argument. Yet Petitioners can cite to only a single reference to "due process" in the entire 7400-page record below. "In short, [P]etitioners did not raise a substantive due process claim in the state courts, and no state court has addressed such a claim." *Yee*, 503 U.S. at 533, 112 S. Ct. at 1531. Therefore, the certiorari petition should be denied.

II. Petitioners Were Not Deprived Of Property Without Due Process Of Law

Petitioners ask this Court to find that conditions placed on land use permits and approvals for an industrially-zoned parcel constitutes a deprivation of Petitioners' property rights in their own parcels that implicates Fourteenth Amendment substantive due process. This newly raised claim would have this Court recognize a novel state property right as a threshold matter, even though that issue was not briefed, argued, or decided in any court below. This is an effort to relitigate a state court decision on federal law issues that were simply never raised and are transparently baseless.

A. Petitioners Have No Protected Property Interest at Stake

A federal substantive due process claim requires a showing of (1) a cognizable property or liberty interest and (2) egregious official conduct. *See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198, 123 S. Ct. 1389, 1396 (2003); *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 784 (2d Cir. 2007). Petitioners do not allege a protected liberty interest, and their alleged protected property interest regarding a parcel of property that Petitioners neither own nor use is unfounded in both federal and state law. Property interests "are not created by the Constitution" but "[r]ather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that

support claims of entitlement to those benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972); *see also Cine SK8, Inc.*, 507 F.3d at 784 (requiring real property right to be vested under state law to support substantive due process claim).

Petitioners, in the last paragraph of their certiorari petition, assert two theories for a property interest in the use of a parcel located well over one-half mile from their own homes. First, Petitioners assert "they have a property interest in their own real estate, and its environment." Pet. at 20. Ownership of real property—even the regulated parcel—is not sufficient to establish a property right for the purposes of a challenge to land use regulation. *See, e.g., Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374 (11th Cir. 1994). Furthermore, in *West Farms Associates v. State Traffic Commission*, 951 F.2d 469, 472 (2d Cir. 1991), *cert. denied*, 503 U.S. 985, 112 S. Ct. 1671 (1992), the Second Circuit rejected an assertion of substantive due process rights premised on the procedural requirements of Connecticut's environmental review statute.

Second, Petitioners assert that the Town Board's re-vote on environmental findings and permits "g[ave] [P]etitioners a further claim of 'entitlement.'" Pet. at 20. This is at odds with Second Circuit case law holding that "[w]here a local regulator has discretion with regard to the benefit at issue, there normally is no entitlement to that benefit." *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994) (rejecting asserted property interest in zoning enforcement for adjoining parcel). With respect to the environmental findings, the court below held that the re-vote was permissible because

implementing regulations of the State Environmental Quality Review Act do not preclude a re-vote on a Town Board resolution to adopt an unchanged environmental findings statement. *See* Pet. Appx. at 8a-9a (citing 6 NYCRR 617.11(a)). Because the Town Board had discretion under state law to approve the Caithness Project, Petitioners had no entitlement. With respect to zoning issues, the local zoning code authorizes electric generation facilities in an area zoned for industrial use upon issuance of a special permit and provides for height variances. BROOKHAVEN TOWN CODE §§ 85-309, 85-313(G), 85-315(B). Petitioners do not cite any authority for the proposition that they have a vested property interest in limiting another property owner to the as-of-right zoning limits of local law.

Nor does the substantive due process clause provide a remedy for Petitioners' generalized allegations of "[b]ribery, or something close to it." Pet. at 17. An "individual entitlement grounded in state law" is the "hallmark of property." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S. Ct. 1148, 1155 (1982). Petitioners' failure to identify such an entitlement is fatal because "universal benefits are not property interests protected by the Due Process Clause." *West Farms Assocs.*, 951 F.2d at 472-73.

Petitioners principally rely on—but misrepresent—New Jersey state court decisions. *See* Pet. at 13. Petitioners state that *Township of Marlboro v. Planning Board of Holmdel*, 653 A.2d 1183, 279 N.J. Super. 638 (Super. Ct. App. Div. 1995), held that unlawful development agreements were "egregious enough to constitute a substantive due process violation," but

there was no federal issue raised or decided in that case. *See* Pet. at 13. The other New Jersey state cases cited by Petitioners all exclusively concern whether land use decisions were authorized by state law and do not address either a federal question or an issue under the United States Constitution. *See* Pet. at 12-15.

B. The Decisions Below Are Consistent With Federal Jurisprudence on Property Rights and Substantive Due Process

Nor is there any conflict between the New York courts' decisions and the decisions of this Court or any federal court.

Petitioners have not identified any courts supporting their property rights theories, much less a split among the states, a split among the federal Courts of Appeals or any discrepancy between New York state and federal decisions that warrants review by this Court. Indeed, if Petitioners had raised their federal constitutional claim below, New York law requires essentially the same substantive due process analysis. *See Bower Assocs. v. Town of Pleasant Valley*, 814 N.E.2d 410, 2 N.Y.3d 617 (2004) (Kaye, C.J.).

Petitioners cite *Lingle v. Chevron*, 544 U.S. 528, 125 S. Ct. 2074 (2005) and subsequent decisions by federal Courts of Appeal holding that property owners may assert substantive due process claims. *See* Pet. at 16. Those decisions are completely inapplicable to this case, because this Court in *Lingle* simply held that the inquiry by courts into whether government action "substantially advances legitimate state interests" is not

a valid takings test. 544 U.S. at 540-41, 125 S. Ct. at 2082-83. That decision did not alter the showing that property owners must make to demonstrate a substantive due process violation and "does not . . . disturb any of our prior holdings." *Lingle*, 544 U.S. at 545-46, 125 S. Ct. at 2085-86. *See also* J. Peter Byrne, *Due Process Land Use Claims After Lingle*, 34 ECOLOGY L. Q. 471 (2007). Here, where Petitioners have never asserted a takings claim, there is no conflict between the New York Court of Appeals' decision and this Court's takings jurisprudence that would warrant review by this Court.

C. The Challenged Permits and Approvals Were Not Arbitrary or Capricious and Accordingly Have a Rational Basis

As noted above, to establish a substantive due process violation, egregious official conduct is required. *Cuyahoga Falls*, 538 U.S. at 198, 123 S. Ct. at 1396. Petitioners' allegation that the Town considered statutorily impermissible factors when making its environmental findings has been rejected under a *less deferential* standard. *See* Pet. Appx. at 8a-9a. The Appellate Division examined the record and held that the Town Board's decisions were "neither arbitrary nor capricious, but [were] based on reasons readily apparent on the face of the record." Appx. at 9a.

On a substantive due process claim, a court must find that there is no conceivable rational basis in a permissible government objective. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8, 94 S. Ct. 1536, 1540 (1974). Here, where the courts below found actual reliance on

permissible factors under New York law, Petitioners would surely have failed the more demanding test for their new federal claim, even if they had raised this claim below.

D. Petitioners Lack Article III Standing

Plaintiffs also lack Article III standing for their substantive due process claim. Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit" and requires (1) an "injury in fact that is distinct and palpable", (2) "fairly traceable to the challenged action", and (3) "likely redressable by a favorable decision." *Ross v. Bank of Am.*, 524 F.3d 217, 222 (2d Cir. 2008) (citations omitted). Petitioners' failure to identify a property interest protected by the Fourteenth Amendment should also be fatal to their assertion of the requisite "injury" for the purposes of Article III standing. "Federal courts are not boards of zoning appeals" to decide routine land use disputes that do not involve federal issues. *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994) (Easterbrook, J.). Nevertheless, Petitioners seek in this Court to relitigate the decisions below finding that Petitioners lack standing under state law to challenge the issuance of land use approvals by the Town of Brookhaven.

In sum, Petitioners have not alleged any federal constitutional property or liberty interest that would be violated by arbitrary government action; they have only alleged arbitrary government action. This is not a sufficient basis for a federal constitutional substantive due process claim, even if it were permissible to raise this new issue for the first time in a petition to this Court.

CONCLUSION

For all of the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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